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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

)
Amendment of Sec. 73.202(b))
Table of Allotments,)
FM Broadcast Stations)
(Garberville and Hydesville,)
California:)

MM Docket No. 94-61

RM-8464

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To: Chief, Allocations Branch, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY COMMENTS BY BRETT E. MILLER

I, Brett E. Miller, ("Petitioner"), permittee of station KWEO (FM), Channel 279C1, Garberville, California (an unbuilt construction permit), respectfully submit these reply comments in further support of the above-referenced Rule Making and the modification of the construction permit to specify Hydesville as its community of license.

I hereby confirm my commitment to proceed with an application for modification of construction permit upon the reallocation as modified by my comments of August 26, 1994, and once the construction permit is granted, I will proceed promptly to construct the KWEO (FM). I also certify under penalty of law that the following information is true and correct to the best of my knowledge.

In the "Opposition to Amendment" submitted by Redwood Community Radio, Inc. ("Redwood"), certain erroneous conclusions were presented which I wish to address at this time.

Parenthetically, although Redwood's comments cause yet another delay in the process of constructing KWEO (FM) and proceeding with

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the provision of first, local service to one of the recognized communities in northern California, I must express some dismay and wonderment at their motivations. On more than one occasion, I have been contacted by a management representative of Redwood seeking to purchase my construction permit. I have always maintained that the construction permit is not "for sale" and that I have every intention of constructing and operating KWEO (FM). I have also expressed my desire to move my family to the area and to live in the area. It would seem to me that Redwood's support of my proposals would be in its best interests: (a) it would allow me to get on the with business of constructing KWEO (FM) and providing first local service to Hydesville, (b) Redwood would have the opportunity to obtain its second channel and (c) Redwood could petition the Commission to allocate one of the various channels which have been identified as allocable to Garberville.

The Proposed Rule Making Does Satisfy the Commission's Allotment Criteria.

On March 27, 1980, the Commission adopted a Notice of Inquiry and Notice of Proposed Rule Making designed to explore the various aspects of its treatment of proposals to amend the FM Table of Assignments. The Notice proposed to update both the procedures employed as well as the standards used to evaluate proposed changes in the Table.

The FM Table is intended to allow the Commission to meet its obligation under Section 307(b) of the Communications Act to

provide a "fair, efficient and equitable distribution of radio service" to the various states and the communities within them. The objectives to be served by the FM Table are:

- * Provision of some service of satisfactory signal strength to all areas of the country;

- * Provision of as many program choices to as many listeners as possible; and

- * Service of local origin to as many communities as possible.

The Commission's FM priorities set forth the relative importance of the service to be provided from the perspective of Section 307(b) of the Communications Act. The original priorities were stated as follows:

- (a) Provision for all existing FM stations.

- (b) Provision of a first FM service to as much of the population of the United States as possible; particularly that portion of the population which receives no primary AM service nighttime.

- (c) Insofar as possible, to provide each community with at least one FM broadcast station, especially where the community has only a daytime-only or local AM station and especially where the community is outside of an urbanized area.

- (d) To provide a choice of at least two FM services to as much of the population of the United States as possible, especially where there is no primary AM service available.

- (e) To provide, in all communities which appear to be of enough size (or to be located in areas with enough population) to support two local stations, two local FM stations, especially where the community is outside of an urbanized area.

- (f) To provide a substitute for AM operation which, because they are daytime-only or suffer service interference at night, are marginal from a technical standpoint.

- (g) Channels unassigned under the foregoing priorities will be assigned to the various communities on the basis of their size, location with respect to other communities, and the number of outside services available.

As set forth on May 20, 1982, in its Second Report and Order, BC Docket No. 80-130, the Commission adopted new and simplified priorities as follows:

- (1) First full-time aural service.
- (2) Second full-time aural service.
- (3) First local service.
- (4) Other public interest matters.

In reaching its decision, the Commission concluded that the first original priority was no longer applicable, as provision had for a long time been made for all existing stations. Additionally, recognition needed to be given to the fact that AM and FM have become joint components of a single aural medium. For some time, the Commission had taken the single aural service concept into account in applying the FM priorities. Anamosa and Iowa City, 46 FCC 2d 520 (1974).

In adopting its new priorities, the Commission reiterated its belief that greatest emphasis needs to be given to assuring the availability of at least one full-time radio service to as many people as possible. The new priority one was adopted for this purpose.

Next in terms of importance are second aural service and first local service. The Commission has given co-equal status to these two priorities.

Finally, the Commission believed that it is preferable to employ a single priority for the remaining areas of comparison.

Since these new priorities are used solely to make a choice between proposals, there is no need for a proponent to undertake an engineering study to demonstrate first or second aural service if no choice between proposals is presented. However, in light of the allegations made by Redwood concerning the numbers of aural services available to either Hydesville and/or Garberville, it is clear that its Opposition Comments are severely flawed.

In addition to the study of FM allocation priorities, the Commission studied its "Reservation Policies" involving preclusion, use of population guidelines, and appropriate class of channel based on the size of the community involved.

Based on the maturation of the FM medium, the Commission decided to end its preclusion policy. Also ended was the apportionment of channels based on the size of the community involved. The Commission believed that the mature nature of the medium would lead many to seek allocations in small communities and, as before, conflicting proposals would be compared in terms of their 307(b) consequences, and preference given to the small community.

Prior to the Second Report and Order, in connection with the request to assign an FM channel to a locality, petitioners had been called upon to show that the proposed location of the channel assignment was in fact a community. This requirement was terminated with one minor exception: Section 307(b) speaks in terms of distribution of facilities among the "several states and communities" [emphasis added]. Section 307(b) requires that the

assignments be made to "communities" as geographically identifiable population groupings. For this purpose it is sufficient that the community is incorporated or is listed in the census--a Census Designated Place.

Based on the above assignment policies, Petitioner hereby asserts that in the current Matter, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules should be amended as proposed.

Consistent with the Commission's FM priorities, the proposed assignment would result in that community's first full-time, local, aural service.

Redwood's arguments seem to be based on conveniently applied double standards. On the one hand, Redwood attempts to show that Hydesville is abundantly served by radio stations by referencing stations, without specificity, licensed to neighboring communities. The fact that Hydesville is a completely independent unit separate from any of those neighboring communities notwithstanding, Redwood presents absolutely no engineering data to substantiate coverage of any type. In fact, Redwood states that it would be "surprised" if the proposed facility offers any service whatsoever, to areas not served by at least five aural services already". Redwood should do its engineering. In fact, Petitioner's originally supplied engineering data showed, the proposed facility at Hydesville will result in a fifth service to 2,722 persons.

On the other hand, Redwood asserts that Garberville and Redway are an isolated pocket, served only by KBEY (FM), and they footnote their comment by pointing out that KMUD (FM) should not be counted.

It seems rather convenient that Redwood chooses to speculate about the number of stations licensed to neighboring communities which might provide coverage over Hydesville, while at the same time they do not use such "seat of the pants" speculation concerning stations licensed to neighboring communities which might not provide coverage over Garberville.

In fact, based on an analysis of the engineering data provided with the comments of Petitioner provided to the Commission in response to the Notice of Proposed Rule Making, it is clear that in addition to the number of signals providing coverage in the gain and loss areas, Garberville is easily served by at least sixteen (16) existing aural services.

Redwood would appear to be making the argument that in the case of Hydesville, the Commission should ignore the fact that there is no locally licensed service, but focus instead on an unspecified and unsubstantiated number of aural services allegedly providing service to Hydesville. At the same time, Redwood is proposing that the one commercially licensed station at Garberville (while discounting the second NCE licensee at Garberville) with the total aural service available at Garberville, and totally ignores its own criteria of available aural services in the area.

Redwood cannot have it both ways: either they use the number of stations to the community or they use the number of aural

services available to the community. Either way, Hydesville is deserving of its first local service.

Hydesville, California, Is a Community.

Redwood argues that Hydesville is not a community. This is absolutely incorrect. Hydesville is a Census Designated Place ("CDP"). A CDP is defined as follows:

"Census designated places are delineated for the decennial census as the statistical counterparts of incorporated places. CDP's comprise densely settled concentrations of population that are identifiable by name, but are not legally incorporated places."

Section 307(b) speaks in terms of distribution of facilities among the "several states and communities". Section 307(b) requires that the assignments be made to "communities" as geographically identifiable population groupings. For this purpose it is sufficient that the community is incorporated or is listed in the census. However, if a petitioner desires the assignment of a channel to a place that is neither incorporated nor listed in the census reports, it will be required to supply the Commission with information adequate to establish that such a place is a geographically identifiable population grouping and may therefore be considered a community for these purposes. This latter showing is totally unnecessary in this particular instance.

In rule making, a "Berwick" issue is said to arise when someone proposes the assignment of a channel to a particular community and it appears that the petitioner's real purpose may be to use this suburban location to serve another larger community

nearby. Berwick Broadcasting Co., 20 FCC 2d 393 (1969). Based on its decision to drop the population guidelines and to alter the priorities, the Commission has stated that it does not believe it is appropriate to question the intent of the party seeking an assignment to a particular community in the rule making process:

"As to any question about the bona fides of the party involved, we believe that it cannot be effectively resolved in rule making where none of the relevant particulars about the actual use of the channel are available. Also, based on our decision to drop the population guidelines and to alter the priorities, the previous incentive to specify a small community will diminish. In any event, we do not believe it is appropriate to question the intent of the party seeking an assignment to a particular community in the rule making process." Second Report and Order, 90 FCC 2d 88 (1982).

Preceding 47 USC 307 Cases

Several preceding 47 USC 307 cases give support to a priority based on local service and local self-expression:

1. To secure a local station and to show need for it, it is not necessary for an applicant to show that programs of clear channel, high power regional, or regional stations, as defined by the Commission, are not satisfactory in service or quality, and where there is overwhelming evidence showing need for a local station, and that the community is served locally by an existing station, it is error to refuse application on grounds that no local need exists. Courier Post Pub. Co. v Federal Communications Com., 104 F2d 213 (D.C. Cir. 1939).

2. In 47 USC 307 comparison, where comparative needs of a community for its first service and needs of community for its

ninth service, the community to gain its first service is preferred. Monroe Broadcasting Co. et al. (1964) 36 FCC 296.

3. 47 USC 307 choice must be governed by relative need of each of competing communities to first local transmission service where conclusion is that no applicant can be preferred on basis of relative need for reception service. Jupiter Associates, Inc., et al. 38 FCC 321, (1965).

4. In requiring fair and equitable distribution of service, 47 USC 307(b) encompasses not only reception of adequate signals but also community needs for programs of local interest and importance and for organs of local self-expression. Pinellas Broadcasting Co. v Federal Communications Com., (1956) 230 F2d 204, (D.C. Cir. 1956), cert den 350 US 1007.

5. When a community of substantial size is without outlet for local self-expression, there is presumption of need for such outlet under 47 USC 307(b); thus, when qualified applicant proposes to meet needs of this type, presumption will dictate grant in absence of evidence of greater need for existing service to be lost by reason of interference from proposed operation. Salem Broadcasting Co., 37 FCC 825 (1964).

6. Commission policy to implement intent of Congress expressed in 47 USC 307 is to afford every community of substantial size, where possible, with an outlet for local self-expression. Raul Santiago Roman., 38 FCC 299 (1964).

Therefore, in this matter, the assignment of first local full-time aural service to the community of Hydesville, California,

should take priority over additional services to Garberville, California.

Site Clearance Problems

Redwood purports to have considerable familiarity with the currently authorized site inasmuch as its authorized transmitter location is the same, and it maintains that the construction by the licensee of KBEY (FM) of a new tower at the site appears to have resolved the matter completely. Redwood presents no information to substantiate this allegation. It is very interesting to note that according to the FCC database, Redwood's station, KMUD (FM), operates as a Class C3 facility with only 200 watts of power and has a construction permit with a required power of only 180 watts. Pretty low for a C3. At these power levels, it is highly unlikely that KMUD (FM) would have an RFR problem, but that is not going to be the case with KWEO (FM).

Construction at the currently authorized site has been and remains a problem. The original licensee of KBEY (FM) did construct a new tower with a monopole extension for the purposes of mounting his antenna at a high enough level to avoid RFR problems, but because of other communications users on the tower and because of the available area on the tower and the manner in which KWEO (FM)'s antenna would have to be mounted on the tower, coupled with the need to protect other low power users, there are severe engineering and RFR concerns.

In September and October of 1993, I was required to re-submit FCC Form 301 for the purposes of correcting coordinate errors established at the time the KBEY (FM) tower was constructed. At that time, my consulting engineer had discussions with the licensee of KBEY (FM) as to the condition of the tower and "population" of the tower users. It was alleged at that time that many of the current users of the tower are not properly located on the tower, and based on those conversations, Petitioner's consulting engineer raised several concerns regarding the ability to properly attach to the tower and the ability to resolve the RFR problems. Further investigations and engineering studies have not been able to resolve those concerns.

Redwood also raises questions as to whether or not I have appropriately identified a transmission site for the facility proposed at Hydesville. As stated to the Commission on August 26, 1994, I have identified an existing-and-available site from which to transmit. I have received reasonable verbal and written assurances that the site is available to me and am proceeding accordingly.

These technical concerns, which came to light only after I had originally applied for the construction permit, are what prompted me to search out a new transmission site in the first place. Even if I were not requesting a change in the community of license from Carberryville to Hydesville, I would seek out a better transmission site. This has been and remains a troublesome site. It appears that a Class A facility might not have the same problems, but the allocated Class C1 facility does.

CONCLUSION

1. Petitioner hereby reasserts his intentions to perfect the construction permit to construct Station KWEO (FM), while maximizing the utilization of spectrum, constructing the Station in a timely manner, and especially providing first local aural service to the community of Hydesville. I believe the proposal is in the public interest, convenience, and necessity.

2. The proposal herein is completely consistent with the Commission's 307(b) allocation policies inasmuch as first local service to Hydesville takes precedence over multiple aural services to Garberville.

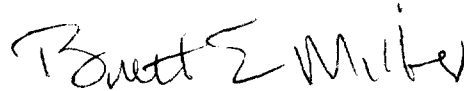
3. Based on the Commission's revised FM Assignment policies, considerations of demographics have been terminated with the exception of the definition "community". The community of Hydesville, a Census Designated Place is a cognizable community under Section 307(b).

4. Based on the Commission's revised FM assignment policies, consideration of so-called "Berwick" issues are not applicable in the rule making process and not applicable in this Matter.

5. The net benefit of the proposal contained in Petitioner's petition will resolve lingering technical concerns and possible technical concerns regarding RFR at the currently authorized transmission site, and will in fact lead to a timely construction of the Station and service to the community of Hydesville.

6. Redwood's negative comments and arguments are based on nothing more than conjecture without any engineering basis, are flawed, inequitably applied, and completely without merit.

Respectfully submitted,



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September 9, 1994

Certificate of Service

I hereby certify that I have, this 12th day of September, 1994, caused a copy of the Reply Comments of Brett E. Miller in the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Garberville and Hydesville, California), MM Docket No. 94-61 (RM-8464) to be mailed first-class mail, postage pre-paid, to the following:

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The foregoing is sworn to, under the penalties for perjury provided in the laws of the United States.



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